

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION NO. 10-5096 (FSH)

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LUKE STEWART, et al., :  
:  
Plaintiffs, : TRANSCRIPT  
:  
-v- : OF  
:  
SAMSUNG ELECTRONICS AMERICA, INC., : PROCEEDINGS  
:  
Defendant. : (CONFERENCE)  
:  
- - - - - x

December 14, 2011  
Newark, New Jersey

B E F O R E: HONORABLE FAITH S. HOCHBERG, U.S.D.J.

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&  
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following transcript is certified to be an accurate record  
taken stenographically in the above entitled proceedings.

s/John K. Stone

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JOHN KEVIN STONE,  
Official Court Reporter

1 THE COURT: Please be seated.

2 Good afternoon, counsel.

3 ( Counsel respond good afternoon ).

4 THE COURT: All right.

5 I have an appearance sheet that's one of the  
6 longest ones I've had in awhile.

7 Who will -- if you'd like to note your appearances  
8 for the record you of course may. You might as well I  
9 guess. And then indicate who will be speaking.

10 MR. SCHWARTZ: Good afternoon, Your Honor.

11 Steven Schwartz from Chimicles and Tikellis for the  
12 plaintiffs. I'll be primarily the spokesperson.

13 THE COURT: All right.

14 Mr. Schwartz, you get the asterisk.

15 MR. ASSUNCAO: Robert Assuncao from Ansa Assuncao  
16 on behalf of Samsung Electronics, Inc. And I'll be the  
17 primary spokesman for defendant Samsung.

18 THE COURT: All right. Thank you.

19 MR. FRIEDMAN: Your Honor, if I may, it's Andrew  
20 Friedman from Cohen Milstein. I won't have an asterisk next  
21 to my name.

22 THE COURT: Okay. You're welcome.

23 MS. TUFARO: Gina Tufaro of Horwitz, Horwitz and  
24 Paradis, no asterisk next to my name.

25 MR. JOHNS: Good afternoon.

1 Ben Johns, also from the Chimicles firm. I don't  
2 need an asterisk either.

3 THE COURT: Okay.

4 MR. SCHWARTZ: With Your Honor's permission, I'd  
5 like to introduce the plaintiffs who have traveled here  
6 today.

7 THE COURT: Yes, please.

8 And I'll tell you in a minute why they're here.

9 MR. SCHWARTZ: From New Jersey we have Jack Petty.

10 MR. PETTY: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. SCHWARTZ: And from Pennsylvania we have Luke  
13 Stewart.

14 MR. STEWART: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. SCHWARTZ: And from Massachusetts, Paul  
17 Bernadin.

18 MR. BERNADIN: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. SCHWARTZ: And in addition, we had sent a  
21 letter about having designees and they happen to have been  
22 from Arizona and Texas and they have traveled here, so I'll  
23 introduce from Arizona, Brian Hauser.

24 THE COURT: Good afternoon, Mr. Hauser.

25 MR. HAUSER: Good afternoon, Your Honor.

1 THE COURT: I'm sure it's a lot colder here than in  
2 Arizona.

3 MR. HAUSER: Slightly.

4 THE COURT: Where are you in Arizona?

5 MR. HAUSER: Scottsdale.

6 THE COURT: That's a pretty nice place.

7 MR. SCHWARTZ: I'm trying to arrange a trip.

8 And Eric Chodun from Texas.

9 MR. CHODUN: Good afternoon.

10 THE COURT: Good afternoon to you. Which part of  
11 Texas?

12 MR. CHODUN: Dallas.

13 THE COURT: Dallas.

14 It's hard for the court reporter to take down my  
15 poor effort to have a Dallas accent. He doesn't even need  
16 to put down that I tried.

17 Okay. Is there anybody else that the defense  
18 counsel wants to introduce, even without an asterisk?

19 MR. ASSUNCAO: Your Honor, I'd like to introduce  
20 Mr. Troisi, Michelangelo Troisi. He's the Senior Counsel  
21 and Director of Litigation at Samsung.

22 MR. TROISI: Hello, Your Honor.

23 THE COURT: Hi.

24 MR. GOOBY: Steven Gooby, from Ansa Assuncao law  
25 firm.

1 MR. MUELLER: Good afternoon, Your Honor.

2 John Mueller, also with Ansa Assuncao.

3 THE COURT: Good afternoon, everybody.

4 Let me just go through the timeline I have and then  
5 I'll tell you why I've asked you to come in. And if there's  
6 anything incorrect about the timeline, you'll let me know.

7 October 14th, 2010, complaint is filed in the  
8 District of New Jersey.

9 January 31st, 2011 complaint is filed in the  
10 Central District of California.

11 May 2011, New Jersey class counsel and Samsung  
12 agree to a term sheet which would conclude the relief to the  
13 class subject only to confirmatory discovery and an  
14 agreement on attorneys' fees.

15 May to June 2011 there are attorney fees  
16 negotiations.

17 July 1st, 2011 there was a court ordered mediation  
18 solely on attorneys' fees because that's the only issue in  
19 dispute. No agreement is reached.

20 August 3rd, 2011, Central District of California,  
21 settlement agreement is signed.

22 August 16th, 2011, Central District of California,  
23 class rescinds its settlement agreement after contacting the  
24 New Jersey class counsel.

25 August 22nd, 2011, Central District of California,

1 class counsel moves to vacate their voluntarily dismissal.

2 September 13th, 2011, I deny a motion to enjoin the  
3 California settlement proceeding, and to stay Samsung's  
4 motion to dismiss pending developments in the Central  
5 District of California.

6 November 14th, 2011, Judge Nguyen in California  
7 denies the motion to vacate the voluntary dismissal.

8 And then on November 21st, 2011 I enter the order  
9 that brings you here today.

10 My reasons for doing this are as follows: And the  
11 reason I particularly wanted the class reps here is that  
12 since last May, over half a year, there's been an agreement  
13 on the essential terms that would be in the best interests  
14 of the plaintiff class, the clients, the people for whom  
15 lawsuits are brought. And both parties confirm to me in  
16 writing that those agreements, the substantive agreements of  
17 what relief would be given to the class members as  
18 distinguished from attorneys' fees, that the terms of the  
19 settlement with the class were not in dispute, and both  
20 sides had agreed to a term sheet, the essence of the terms  
21 and thus, as of last May, there was on the table the ability  
22 for the clients to get relief that counsel on all sides  
23 believe is full, fair and satisfactory. And that goes for  
24 the defendants as well.

25 Since last May, the only ball that has been in

1 play, based on your representations to me that I'm  
2 summarizing from the various communications I've received  
3 from you in connection with the motion that you brought  
4 before me, the only ball in play is attorneys fees. A  
5 genuine dispute.

6 Now, that gives me some serious pause. I now am  
7 being asked to resurrect a motion to dismiss. Because, not  
8 because the merits of the case are even at issue anymore.  
9 The only thing that's at issue is the fight between you  
10 about attorneys' fees. Which are only going to grow  
11 greater, greater and greater, as you continue what's  
12 essentially Pyrrhic warfare.

13 I say Pyrrhic because -- and you're putting work on  
14 to the Court that it normally wouldn't have to do because  
15 essentially the dispute in this case has been settled. Why  
16 am I to drop all the other cases that really need my time  
17 and attention to decide a motion to dismiss in a case in  
18 which both sides have agreed on the essential terms of the  
19 substantive settlement?

20 It concerns me in multiple ways. One, it's the  
21 archetypical example of this lurking conflict of interest  
22 between plaintiffs' counsel and the plaintiffs themselves  
23 and the class members that is inherently always there in  
24 class actions and has been noted in the literature and in  
25 cases, and in even the Third Circuit task force report as

1       being there. But it's putting it very squarely front and  
2       center.

3               Now, that's giving me some serious concern and  
4       pause. And I can understand from defendant's point of view  
5       that you want to know your total global potential exposure  
6       before you finalize a settlement. So I understand that and  
7       I'm not saying you're in an ethical quandry, but as a result  
8       you're in essence saying to the Court, you know, be a  
9       gladiator. Go -- we're fighting it out over attorneys'  
10      fees, so we're going to give you something. Please, Judge,  
11      stop all your other work, and decide a motion to dismiss,  
12      which really isn't necessary to decide, but do it anyway,  
13      because the case has been settled, because we can't agree on  
14      attorneys' fees. There's something very unsettling about  
15      that which I'm sure you can understand.

16             Having seen all that, getting to the heart of it in  
17      my usual rapid manner, I thought we'd bring you in and see  
18      if we could find a way to a resolution, either a full  
19      resolution or a procedural resolution, in a way that would  
20      allow two things to happen: One, the class members of whom  
21      there are five representatives present, others that are on  
22      the phone, and I'm happy to hook them up if anybody thinks  
23      it would be beneficial to have them hooked up.

24             Does anybody think that? No, yes?

25             MR. SCHWARTZ: I don't think it's necessary.



1 Obviously, they're available if Your Honor wants somebody  
2 hooked in.

3 THE COURT: Understood.

4 I just wanted to be sure because of this issue that  
5 plaintiffs are actually hearing this and thinking about it.  
6 Because all the people that they are representatives for  
7 have not gotten the benefits of a settlement that has been  
8 on the table for seven or eight months. I'm not --  
9 approximately. Because of this attorneys' fees dispute.

10 And while I understand that tempers and emotions  
11 run high in class actions, it's always essential to remember  
12 that the clients come first.

13 So now we have, we're sort of in this arena. We're  
14 also, we, the courts, my staff, myself, we're not free  
15 goods. We're not someone you ring a gong and say, okay, go  
16 do this work, which is really advisory and unnecessary and,  
17 frankly, there's not even a ripe controversy about the  
18 motion to dismiss. It's really something new while you  
19 continue to fight about attorneys' fees, which doesn't  
20 really strike me as a laudable use of my time or my staffs'  
21 time, and does tend to treat us as a kind of free goods  
22 sitting here, which perhaps in a very light docket  
23 jurisdiction would make some sense. But this isn't one of  
24 those.

25 So I have a number of thoughts, but I wanted to put

1       those out on the table so that you would understand the  
2       reasons why I've asked you to come in. They're multiple,  
3       they're more, but that's where we are.

4               So how do we find a way through this apparent  
5       impasse without just saying, okay, so now we're sending all  
6       the boxers out into the ring again to box, and the first  
7       thing we have to do to keep boxing only about attorneys'  
8       fees, Judge, is for you to write an opinion about the  
9       substance of the case. Not so fast. And not without  
10      exhausting every other possibility. And not without me  
11      thinking long and hard about what I will do with respect to  
12      the attorneys' fees if I'm required to do that at the end of  
13      the day. And that could go either way. There could be an  
14      augmentation, if it's an unnecessary act, and there could be  
15      a reduction, if it's an unnecessary act. Depending on how I  
16      view the players, their motivations, and the reasons that  
17      they're putting the plaintiffs and me in this bizarre  
18      position.

19              So what I'd rather do than have to pen something  
20      like that, is have the intelligent minds that I see looking  
21      back at me think about this, not just say that's it, we  
22      can't agree, therefore we're back in court fighting about  
23      something we've resolved. But, rather, saying is there a  
24      way to slice off the attorney fees question, either agree on  
25      it today, or agree on a high-low that goes to binding

1 arbitration, or some procedural mechanism so that valuable  
2 court time is not spent on a needless, I'm not even sure  
3 what I'd be writing. I'd be writing an opinion the parties  
4 don't really need, the outcome of this, because they've  
5 agreed to the terms of a settlement. But they won't sign it  
6 because they can't agree on how much money gets exchanged  
7 between them. Isn't that a pretty picture?

8 And by the way, the plaintiffs, the people for whom  
9 this case is brought, have had certain rights available to  
10 them since last May, but they can't take advantage of them  
11 because everybody's fighting about attorneys' fees. I'm  
12 developing course materials right now on a professionalism  
13 issue, and this thing is rapidly making its way into my  
14 course materials.

15 So any ideas? I'll start with the defendants.

16 MR. ASSUNCAO: Thank you, Your Honor.

17 Well, if Your Honor wants to conduct maybe some  
18 discussions with counsel privately, and see if we can get a  
19 little closer on the fee issue, I think that would be a good  
20 start.

21 And if that doesn't help, then we can look at those  
22 other options that you may have in mind.

23 Certainly, from Samsung's standpoint, from the  
24 beginning of this case eight months before the first lawsuit  
25 was filed, Samsung had recognized the issue with the

1 capacitors, had begun providing free repairs to its  
2 customers. The suit was filed, they immediately began  
3 settlement discussion with plaintiffs counsel, which  
4 ultimately resulted in the term sheet. And the only issue  
5 that has been outstanding since then has been the fee issue.

6 THE COURT: I know that. I don't mean to interrupt  
7 you, I know that from you, and I know that from your  
8 adversary.

9 MR. ASSUNCAO: Right.

10 THE COURT: Which is why, when I see an application  
11 for me to stop everything else I'm doing, which is huge  
12 amounts of it, you see what the dockets are like. And write  
13 something that's totally unnecessary to write, just so you  
14 guys can keep warring, it seems to me to be -- I'm trying to  
15 think of a polite word that encompasses what I'm thinking.  
16 I'm not going to say it. Can't think of a polite word.

17 MR. ASSUNCAO: And, Your Honor, last thing we want  
18 to do, in fact the whole idea about approaching initially to  
19 discuss settlement was to avoid the motion practice and the  
20 term sheet was entered into before any depositions, any  
21 substantial discovery being exchanged, any motion to  
22 dismiss, to avoid this very thing.

23 THE COURT: Understood.

24 And laudibly so.

25 The problem we now have is there's got to be a way

1       where the fine minds of the assembled people in this room  
2       can come up with a way to make this happen.

3               I don't want an old, stale and, frankly,  
4       meaningless set of motion papers taking up our time and  
5       further delaying the right to relief that everyone agrees on  
6       on behalf of the five gentlemen who are here, the six more  
7       or so on the telephone, and countless others in the class.  
8       And it's -- so I am essentially ringing the gong with my  
9       mantle that requires me to look for justice and saying, I'm  
10      worried about this. Maybe you aren't, maybe you aren't, but  
11      I am.

12             MR. ASSUNCAO: We certainly, from Samsung's  
13      standpoint, they are worried about it.

14             Because, number one, they're incurring costs and  
15      they have incurred substantial costs that they would  
16      otherwise not have incurred. That was the whole idea of  
17      entering into the settlement in the first place, number one.

18             And number two, there are additional things that  
19      are happening that are going to further cause -- increase in  
20      costs, defense costs, on an issue that they again want to  
21      put behind them, and have thought they were very close to  
22      putting behind them seven months ago.

23             THE COURT: Okay.

24             Can I ask you to be not, gentlemen -- please, I've  
25      heard from you, I'd like to give your adversary, unless

1       there's something else you absolutely felt you had to say.

2               MR. ASSUNCAO: No.

3               The only thing is I think for my benefit, if we had  
4       Your Honor, if you have some time today, just have meetings  
5       with counsel and see, and maybe we can work something out.  
6       And if the answer is no to that, then we can discuss other  
7       ideas of trying to get through this impasse.

8               THE COURT: Okay.

9               All I would ask you to do is start thinking about  
10      all the ideas now. I want to move this train to a quick  
11      resolution. I think that is in the best interest of justice  
12      and it avoids this thing kind of beginning to look like a  
13      black-eye for the legal profession.

14              MR. ASSUNCAO: Certainly. Understood.

15              THE COURT: Okay. Yes.

16              MR. SCHWARTZ: Your Honor, we appreciate your  
17      concerns, and we share the frustration. Because we do want  
18      to get the settlement we negotiated delivered to the class  
19      members. And I agree with Your Honor that it really is time  
20      to bring this to a close and get some finality here.

21              There are issues with this settlement, because  
22      there was confirmatory discovery requirement, and there are  
23      some issues that will have to be addressed because the  
24      agreement we had was these are the minimum terms and if the  
25      confirmatory discovery, which we were promised, and which

1 the representations would show that the terms are right,  
2 that --

3 THE COURT: How long would this confirmatory  
4 discovery take?

5 MR. SCHWARTZ: It would not take long. Under the  
6 original contemplation of the settlement agreement --

7 THE COURT: Have you done anything?

8 MR. SCHWARTZ: We.

9 THE COURT: since --

10 MR. SCHWARTZ: Yes.

11 THE COURT: Since -- what have you done since this  
12 warfare broke out between you and California counsel?

13 MR. SCHWARTZ: We have reviewed all the documents  
14 produced from Samsung. We have intakes, class members  
15 contacting us on almost a daily basis. We have reviewed  
16 every intake. We have, so we can understand exactly what  
17 the scope of the capacitor problem is. We had scheduled  
18 some depositions which were going to happen next week when  
19 we got put off the calendar because of Your Honor's order  
20 saying discovery --

21 THE COURT: They're not off the calendar. I --  
22 they're still on the calendar if they're substantial.

23 I'm not -- do you understand how ridiculous it  
24 seems to me to have you start taking discovery in a case  
25 where both sides have sent me letters saying we've agreed to

1 the essential terms of a settlement here?

2 MR. SCHWARTZ: Yes. Even though those depositions  
3 were going to be from our perspective so we can satisfy that  
4 our minimum terms we negotiated --

5 THE COURT: So you're saying to me these were just  
6 confirmatory depositions? I'm not buying it.

7 MR. SCHWARTZ: We were in litigation, Your Honor,  
8 with Samsung, so they were, for all purposes. But first and  
9 foremost, what we were doing -- but we have an idea how to  
10 get past the fee issues, because I agree with Your Honor, it  
11 makes no sense for the settlement to be stuck in the middle  
12 because of the fee issue.

13 THE COURT: Hasn't -- since the moment it started,  
14 and it's taken eight months, and me being my usual stern  
15 jawed self, to make it happen, which I don't like always to  
16 be that, but apparently it's my role and I'll do it. But I  
17 think it behooves everyone to get this done.

18 MR. SCHWARTZ: I agree.

19 THE COURT: And, frankly, what it's doing is it's  
20 raising frontal to me and to any colleagues I talk to, this  
21 issue about battles between different sets of class action  
22 counsel in different jurisdictions, and the waste of court  
23 time that that engenders.

24 I have that very issue with a draft opinion in  
25 another case. It's not as stark, it's different than this.



1       It's in some ways -- it's in some ways different, but the  
2       principle remains the same. And that is the sense of double  
3       work being thrown at the United States court system where  
4       it's not necessary, simply because class action groups of  
5       lawyers are fighting with each other. They represent the  
6       same classes, but file overlapping, essentially, the same  
7       lawsuits in multiple jurisdictions, and have no problem  
8       sapping court time that way. That's wrong. It has to stop.

9               And here you are back in New Jersey where you  
10       wanted to be, and I seem to be the one having to come up  
11       with a way to make it stop.

12              But, by golly, if this has to become an issue on  
13       the national agenda, let it be. Because we are not just  
14       sitting here twiddling our thumbs waiting for something to  
15       do. We're not just sitting here waiting to have two  
16       different judges have the same class and have double the  
17       work. It's not fair and reasonable, nor sensible use of  
18       judicial resources, which are paid for by the taxpayers of  
19       the United States, to solve real controversies that need  
20       solving. There's one real controversy that needs solving,  
21       this class. And this class is one class. But we've got  
22       attorney warfare rising above the needs of the class.  
23       That's a big concern with these multiple jurisdiction  
24       battles. And I expect counsel to resolve it so that I don't  
25       have to write about it.

1 MR. SCHWARTZ: Fully understood.

2 And so what I suggest --

3 THE COURT: The reason I asked you here, gentlemen,  
4 is so you would understand from my mouth what's going on.  
5 Because you represent the class. You're not these guys  
6 tools. You are independent members of a class, and you are  
7 their representatives, and it's your job, if need be, to  
8 explain to them why it is that the settlement that was  
9 essentially agreed to eight months ago hasn't happened yet.

10 So it's not like you're simply nominal  
11 representatives, which many plaintiffs class members feel  
12 they are. You're not. You are the client. And you have  
13 jobs and duties as the client. Which you're either doing  
14 well or doing poorly.

15 And the extent to which any incentive award is  
16 given is based on how well or poorly you do your job  
17 representing the best interests of your class, which had a  
18 settlement on the table without any serious objection last  
19 May, that's why you're here, gentlemen.

20 I'd say ladies and gentlemen, but there are only  
21 gentlemen. If there were women here they we wouldn't have  
22 the issue, because they would have gotten to the heart of it  
23 already. That's a joke.

24 We mean to -- I saw you turn sideways, I thought I  
25 didn't see somebody. All right.

1                   So, any ideas on this whole thing? I'm happy to  
2                   meet with each of you once, privately. I've got a  
3                   conference call in another matter at 3 o'clock. That gives  
4                   us 52 minutes, approximately 57 minutes, something like  
5                   that. 53 minutes.

6                   I'm happy to try to have one meeting with each of  
7                   you. What I'd ask you to do while I'm meeting, be thinking  
8                   on more than one track and involve your clients as well.  
9                   Because they may have something to say about this. They  
10                  have a right to have -- say something about this.

11                  One possibility is sever off the fee fight and  
12                  throw it -- first try and negotiate it, perhaps agree to  
13                  binding arb. If you must come back to me. Not non-binding.  
14                  Either binding arb or you'll battle it out with me and I'll  
15                  put people on the stand and rule as I see fit. Or negotiate  
16                  the total sum today, or come up with a high-low agreement  
17                  and go to binding arb subject to a high-low. Or anything  
18                  else your wise minds can come up with.

19                  You plaintiffs will have to consult with your  
20                  clients. Obviously, Samsung will have to consult with its  
21                  client. I don't expect this to be delayed. There's got to  
22                  be a way that the relief that's been negotiated can occur.

23                  If there's confirmatory discovery, I have no  
24                  problem with confirmatory discovery only being continued on  
25                  the same dates that you had set out for deposition. But

1       that's it. I'm not launching a completely moot battle,  
2       simply because lawyers can't agree on fees. Just not what I  
3       do. In fact, I'm not even thinking it's wise or just.

4               Okay. So we have a form that we'll give you, and  
5       it's totally voluntary whether you agree with it or not, and  
6       essentially the form says, do you -- and you don't have to  
7       consent. It's truly fine by me. It asks if you consent to  
8       meeting, one side meeting with me in the absence of the  
9       other side, and then the other side meeting with me in the  
10      absence of the first side. It's essentially serial ex parte  
11      discussions in my role as mediator. It's not mandatory.  
12      And, indeed, I never do it in a bench trial. This is  
13      clearly not a bench trial.

14             The only concern I have is I don't want you to sign  
15      that form if you would have any objection to having those ex  
16      parte communications if one of the ultimate means of  
17      resolving this case is a fee litigation over which I  
18      preside. I will not send this fee litigation issue to  
19      another colleague. I don't think that's right.

20             And to the extent this resembles a bench trial  
21      where I would send it to another colleague, that's the  
22      reason for my caution. I'm not going to do that. So if by  
23      signing this form you're essentially agreeing for that rare  
24      thing to happen, and that is to have mediation with me,  
25      knowing that if there's no other resolution of the fee

1 battle other than a hearing, and I call it, please don't go  
2 down that road. I would rather send you to a Magistrate  
3 Judge or a private mediator who can meet with you forthwith.  
4 And then I stay untainted as it were, and able to preside  
5 over a true fee battle, if we get to that.

6 Your thoughts on that.

7 MR. SCHWARTZ: Your Honor, what we had -- well, we  
8 had proposed --

9 THE COURT: Because that issue -- sorry. I don't  
10 mean to interrupt you. Because that issue can't go to a  
11 jury, we will never ask a jury to decide that issue. That's  
12 my job.

13 MR. SCHWARTZ: Right.

14 THE COURT: And that's why I hadn't done this  
15 already. The only reason I mentioned it is because I'm  
16 frustrated that I sent you to court mediation once and it  
17 didn't work.

18 MR. SCHWARTZ: Right.

19 And we agree with Your Honor that severing the fee  
20 issue from the settlement issue makes sense.

21 We have proposed to Samsung, and we remain willing  
22 to have the fee decided without any preconditions or with a  
23 high-low.

24 And, frankly, Your Honor, we're prepared to have  
25 Your Honor decide it without preconditions. We're prepared

1 to have Magistrate Shwartz decide it without preconditions.  
2 We're prepared to go to former Judge Orlovsky to decide it  
3 without preconditions. Obvious subject to Your Honor's  
4 obvious rerule and approval and evaluation. And Judge  
5 Orlovsky was a mediator that was chosen by Samsung based on  
6 a prior experience with Judge Orlovsky. So we were willing  
7 to do that.

8 We're willing to have Your Honor pick someone else  
9 who is a wise person to be the arbitrator. We agree that we  
10 should try to sever this from the settlement, so we can get  
11 the settlement, you know, make sure the terms are right and  
12 then get the settlement hopefully approved, and then for the  
13 fee issue, have it decided, and which ever side has  
14 miscalculated as to what is a fair fee, then they'll have to  
15 live with that.

16 I did have this situation happen once. It was a  
17 case very similar. We settled relatively early, it was a  
18 full recovery for class members, more like what we have  
19 negotiated here. And then when we were, Your Honor, before  
20 former Justice Pollack as a mediator, we agreed rather  
21 quickly, let's sever, with Judge Infante and JAMS in  
22 California, with the District Court Judge's approval, went  
23 and had the mediation. Turns out that mediation went pretty  
24 well for me than the defendant. But that's not really  
25 relevant. The relevant thing is we got a vehicle to have it

1 settled, it got settled, Judge Infante gave a very nice  
2 opinion and decision, which the District Court Judge was  
3 able to evaluate and not be overburdened with having to do  
4 all the work herself, because we understand that judges have  
5 very heavy dockets, and there are important issues with lots  
6 of people to come before Your Honor, in every District Court  
7 in the country.

8 THE COURT: Let me ask you. Is there a -- is there  
9 a move afoot among the class action firms to stop having  
10 this problem happening again? I'm at some point going to  
11 call Judge Nguyen and start a judges dialogue about this.

12 MR. SCHWARTZ: My understanding is that the  
13 California -- the lawyers in that California case are done  
14 with this case.

15 THE COURT: Oh, I'm sure they are. That doesn't  
16 mean that Judge Nguyen and I are done with the issue.

17 MR. SCHWARTZ: Right.

18 THE COURT: I don't want to see this again.

19 MR. SCHWARTZ: Neither do I. I feel it's  
20 frustrating. Because it is unfair to Your Honor to have  
21 this drag on. I think it's unfair to all of us. And I  
22 think we have to get it resolved. And I am willing --

23 THE COURT: I'm not talking about the drag on  
24 problem. I'm talking about filing multiple suits for the  
25 same class. There ought to be a way that that doesn't

1       happen.

2               MR. SCHWARTZ: I think the rules, with the addition  
3       of Rule 23(g) is the interim counsel appointment, that from  
4       my perspective that's what the interim counsel appointment  
5       was designed to do.

6               And I can tell Your Honor, when we first went down  
7       this road early on in the case with Samsung's former  
8       counsel, Basilus Sparh, they specifically requested us,  
9       because there were multiple cases filed, they were asked to,  
10      as they called it, herd cats, get some kind of leadership in  
11      place. So they knew they were talking to one person and one  
12      group of people with authority, and that's why both parties  
13      came into Your Honor with a interim counsel appointment  
14      order proposal, which was signed. And, frankly, we thought  
15      that regardless of whether the settlement talks were  
16      successful or went down the litigation track, we thought  
17      that procedure was one in place so we wouldn't have the  
18      issue of what do you do if people three months down the  
19      road, six months down, a year down the road decide, oh,  
20      there's a settlement that might be available for someone to  
21      be a vehicle to drive home, let's file something and do it.

22              THE COURT: Is there any procedural mechanism other  
23      than an MDL for this kind of stuff?

24              MR. SCHWARTZ: An MDL obviously is one way to deal  
25      with federal court, multiple federal court cases.



1           With respect to state court cases that can be  
2       filed, there's obviously the All Writs Act, which is --  
3       certainly power should be exercised very judiciously.

4           I do think fundamentally though, Samsung, you know,  
5       is a New Jersey based company, they're here in this court  
6       and the court does have jurisdiction over Samsung. I think  
7       both of us are hearing Your Honor that for this problem in  
8       this case, once, Your Honor wants to resolve.

9           THE COURT: All right.

10          We're going to resolve my global issue to make sure  
11       this never happens again. But although at some point I will  
12       not stop until I see a resolution. It's too often that  
13       class actions look like an attorney industry rather than  
14       representation of a client. That shall not happen under my  
15       watch. You've got a client, they're here. They have a  
16       voice. They don't get an incentive award if they don't  
17       speak up early, often and vociferously for the rights of the  
18       class. Which is different from the lawyers' right to a fee.  
19       That's why they're here. I'm sure they'll share the good  
20       news with everybody else.

21          MR. SCHWARTZ: And I can assure Your Honor that our  
22       class representatives have been in contact with us, been  
23       fully informed, the class representatives. We have a  
24       cross-section, we have a retired judge, we have another  
25       attorney, we have people who work in various industries, you

1 know, across sections of regular people, and they know what  
2 the situation is, and they understand what the fee issue is,  
3 and we have discussed the issue of severing the fee from the  
4 settlement.

5 THE COURT: I understand. But -- and that's  
6 obviously in your interest. But your adversary would say,  
7 and justifiably have the position, that they can't agree to  
8 an open-ended exposure. Right?

9 MR. SCHWARTZ: Right.

10 THE COURT: And so that's not fair to them.

11 And so we need to come up with a methodology that's  
12 fair to all, but that gets the lawyers out of the pickle  
13 that they've worked their way into.

14 Frankly, had Judge Nguyen allowed that other  
15 settlement to be reinstated, you would be in the same  
16 position as my other case was, where two warring attorneys  
17 filed the identical action, each separately on behalf of a  
18 different class representative. And one side settled, and  
19 the other side did not. And despite a lot of vitriolic  
20 words, it was a full, fair, complete settlement, and nobody  
21 even had any objection they could think of to file against  
22 the other settlement.

23 And so the firm that didn't settle, ended up to  
24 having voluntary dismiss, because the class just left them.  
25 The class went along with the settlement and they didn't

1 negotiate the settlement, they were left with litigation  
2 with no client. But that still wasted a lot of court time.

3 The only trouble there was I was all the court  
4 time, both cases were filed with me. Why I'm accutely  
5 sensitive to this issue. But I don't want to see -- I've  
6 got this issue coming up more and more often, and attorneys  
7 viewing these cases as their own industry. It's not. I  
8 know you know that.

9 MR. SCHWARTZ: Yes, I do.

10 THE COURT: But I intend to drive that point home  
11 as often as possible to both sides.

12 All right. What are we --

13 MR. ASSUNCAO: Your Honor, if I just may, because  
14 you touched upon a subject that probably opens the door,  
15 this additional disclosure to the Court. Three new lawsuits  
16 have been filed similar to these.

17 THE COURT: Where?

18 MR. ASSUNCAO: One in New York, one in Oklahoma and  
19 one in California within the last three to six weeks.  
20 Samsung has been served with two of them, the third has not  
21 been served yet.

22 THE COURT: Understood.

23 But if you settle on behalf of the class and there  
24 are not a lot of opt outs, then the class evaporates.

25 MR. ASSUNCAO: I understand that, Your Honor. But

1 I just wanted to let you know.

2 THE COURT: Yes.

3 No, look, I didn't know that. I'm not surprised.  
4 Because essentially, after awhile, it looks suspiciously not  
5 like relief for consumers, but rather, hey, one more mouth  
6 at the trough, and that's an issue about which I feel  
7 strongly, about the professionalism of my profession. But  
8 if we can get -- it behooves you to try to get this thing  
9 resolved as fast as possible, get the machinery in place.

10 MR. ASSUNCAO: Sure.

11 THE COURT: To provide notice to the class, you  
12 know, and get this done. Because something's got to deter  
13 all that.

14 Now, presumably -- and then, by the way, an MDL is  
15 not the only solution, because then there are state court  
16 lawsuits.

17 MR. ASSUNCAO: MDL may make things more complicated  
18 and prompt additional filings, which it tends to do.

19 THE COURT: It could.

20 I'm -- having had, I don't know, seven or eight  
21 MDLs or so, I agree, it's not a panacea. Sometimes works  
22 extremely well, sometimes not.

23 MR. ASSUNCAO: Well, you brought up this signing of  
24 a waiver in terms of meeting with the court individually,  
25 the parties meeting with the court, we're still willing to

1 do that, Your Honor. Samsung -- I don't know if plaintiffs  
2 counsel is.

3 THE COURT: Yes. So that's the question.

4 I want you to think about this in a worst case  
5 scenario. I don't expect us to get there, but, if the worst  
6 case scenario, none of the affirmative methods I've been  
7 throwing out as a possible idea, i.e. arbitration,  
8 high-lows, if none of those works, then I would have to be  
9 the one that would have to hear from everybody and decide  
10 what's a fair legal fee. And I don't want anybody at that  
11 time saying, because I confided in you or you had ex parte  
12 communication settlements with me you really can't decide  
13 that. So I really want to give you time now to huddle with  
14 each other and think about it before you agree, and then I  
15 would want you to state on the record that you would agree  
16 to that, notwithstanding. Because I really don't think it's  
17 at all fair to rope yet another judicial officer into this  
18 battle. I mean everybody's busy and has real controversies.  
19 Everybody knows there is an attorneys fee. The only  
20 question is what's the right number.

21 So I'm going to give you five minutes or more, if  
22 you need. If you want to confer with your clients.

23 Does everybody understand the issue I'm asking them  
24 to decide?

25 MR. ASSUNCAO: Yes.

1 MR. SCHWARTZ: Yes.

2 THE COURT: All right.

3 I'll give you five minutes. I'll be back out.

4 MR. ASSUNCAO: Great, Your Honor.

5 MS. BURO: All rise.

6 ( After a brief recess court resumed ).

7 MS. BURO: All rise.

8 THE COURT: You may be seated very briefly.

9 Has each side had a chance to confer about the  
10 procedural question?

11 MR. SCHWARTZ: Yes, Your Honor.

12 THE COURT: All right.

13 Mr. Assuncao?

14 MR. ASSUNCAO: Yes, Your Honor, I have as well.

15 THE COURT: Yes. Okay.

16 So what's the position?

17 MR. SCHWARTZ: We're prepared to sign any form Your  
18 Honor wants us to sign, and we're prepared to talk to you  
19 with the conditions you set.

20 THE COURT: Okay.

21 So you understand and agree that if another method  
22 is not arrived at for a neutral to decide the fee battle  
23 between you, that I will be deciding it without a jury.

24 MR. SCHWARTZ: We are -- we welcome Your Honor  
25 deciding it if we can't negotiate it.

1 THE COURT: All right.

2 MR. ASSUNCAO: We also agree, Your Honor.

3 THE COURT: And nobody feels arm-twisted? Because  
4 it was certainly not my intention.

5 MR. SCHWARTZ: Not at all, Your Honor.

6 MR. ASSUNCAO: No, Your Honor.

7 THE COURT: Okay.

8 Then let's very briefly begin. We may be  
9 interrupted by a marshal showing up in the middle of this,  
10 but -- and there may be other short delays.

11 I have to get on a call at 3 o'clock. But we might  
12 be able to make substantial progress before that.

13 Who would like to meet with me first? Is there  
14 anything else? We're now going to go into the mediation  
15 mode. I'm going to tell the court reporter he no longer  
16 needs to take this down. Anything you'd like to say to each  
17 other before we meet privately?

18 MR. ASSUNCAO: I don't think so.

19 MR. SCHWARTZ: Just that we would like to get this  
20 done both for the class and get it done.

21 THE COURT: Okay. All right.

22 ( Court adjourned ).

23

24

25

